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ABSTRACT

Following "Tinker vs. Des Moines Community School District," the United States Supreme Court decision that assured First Amendment rights to secondary school students and teachers, California began experimenting with statutory guarantees of free expression for students at the high school and community college levels. Decisions issued by several federal circuit courts of appeal have freed students from regulations allowing arbitrary prior censorship although none of these cases specifically applied to official school newspapers. In 1971, the California Legislature set forth freedom of expression guarantees for secondary students but made no reference to student newspapers produced in journalism classes; some school districts, therefore, concluded that such papers were not covered in the guarantees. The Los Angeles school board produced its own guidelines that prohibited the use of profanity and the endorsement of political candidates and allowed for prior censorship by principals. However, in 1976, the California Supreme Court banned any form of prior censorship, after which the California statute was amended to include student newspapers and to allow prior restraint only in cases of libel, slander, obscenity, and material threatening a substantial disruption of school activities. In spite of this, some school officials continue to ignore the law and to adopt restrictive policies for student newspapers. (Portions of the California law and the Los Angeles guidelines are appended.) (TJ)

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PROTECTING STUDENT PRESS FREEDOM BY STATE LAW:

THE EXPERIENCE IN CALIFORNIA

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INTRODUCTION

Much has now been written about the new freedom of expression available to high school students under the U. S. Supreme Court decision of *Tinker v. Community School District*[1] and its constitutional progeny. Articles by Fager[2], Letwin[3], Trager[4] and others have developed the theme that student journalists who attend public schools enjoy a large number – if not the full panoply – of rights and privileges available to professional journalists.

Indeed, a convincing case may be made for the proposition that the student editor actually has greater freedom than the commercial editor who answers to a private publisher – his employer.[5] Under the "Forum Theory" of the student press, school officials have been held to lack many of the prerogatives of private publishers.

In no less than seven cases, four different federal Circuit Courts of Appeals have upheld high school students' rights to publish and distribute periodicals on school campuses in defiance of administrative edicts purporting to forbid or penalize such activities. Schemes of prior restraint have been invalidated repeatedly by these courts. In fact, one federal circuit has taken the absolute position that there may be NO prior restraint of the student press by school officials beyond that permitted of private publishers by governments under *Near v. Minnesota*[6] and *New York Times v. U. S.*[7]

However, these decisions have been predicated upon the First and Fourteenth Amendments to the federal Constitution, as applied by the Supreme Court in *Tinker*. Almost unnoticed among all of this judicial activity has been California's unique experiment with statutory guarantees of free expression for students, both at the school and community college levels. The initial impetus for California's statutory guarantees, which were enacted by the legislature in 1971, was an unreported federal district court decision.[8] But since then, these statutes have spawned their own local case law, climaxing in the California Supreme Court decision of *Bright v. Los Angeles Unified School District,*[9] which has interpreted these statutes as forbidding *any* prior censorship on grounds largely distinct from the federal constitutional issues involved.

Nevertheless, even as the state Supreme Court was deciding *Bright* in a fashion that made it a great triumph for those who oppose prior censorship of the press, associations of California journalism teachers were lobbying for new legislation which would reimpose prior censorship of student expression – but granting in return a specific statutory assurance that official campus newspapers were among those protected by the law.

As this is written, this legislation appears headed for enactment in Sacramento. Should that occur, it would be a remarkable first instance of any state setting up specific statutory safeguards for the freedom of official school newspapers. But at the same time, the proposed new law raises serious constitutional questions by its cavalier approval of prior review under circumstances lacking the procedural safeguards and narrow standards required by recent federal court decisions.

After presenting a brief summary of the student press freedom cases that followed *Tinker*, this paper examines the development of California's unusual statutory approach to freedom of

expression for students from the original *Rowe v. Campbell*[10] decision to the current effort to reimpose censorship in the aftermath of *Bright*.

THE CONSTITUTIONAL BACKGROUND

The student protest movement of the late 1960's produced a number of dramatic changes in the American educational system. While the students were typically crusading for such causes as the civil rights of minorities or an end to the Vietnam War, one of their greatest long-range achievements was a dramatic growth of their own civil liberties.

When students wore black arm bands to protest the war, their action may or may not have had any significant effect on American foreign policy. But when some of them were suspended from an Iowa high school for wearing arm bands there began a chain of events that led to a major expansion in the constitutional rights of students. For in *Tinker v. Community School District,*[11] the United States Supreme Court found an occasion to announce that first amendment rights do not end where a school ground begins:

> "First Amendment rights, applied in the light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." (393 U.S. at 504)

Rather, the Supreme Court said students have the same rights as other citizens except when those rights must be curtailed "to avoid material and substantial interference with school work or discipline." Whether school officials interfere with student expression by direct prior censorship or by subsequent punishment, the penalty must be justified by a showing that the expression in question will produce a "substantial disruption of or material interference with school activities . . . " (393 U.S. at 514)

Once the Supreme Court delivered that victory for students' civil liberties in 1969, there followed a series of additional setbacks for school officials who insisted on clinging to the old "in loco parentis" attitude[12]. In federal courts, decision after decision has liberated students from regulations allowing arbitrary prior censorship of student expressions of opinion.

Because the line of cases that followed *Tinker* has been widely discussed already, and because the primary purpose of this paper is to discuss California's little-noticed statutory activity in this field, the post-*Tinker* federal decisions will be cited only briefly here.

However, it should be noted that in at least seven different cases federal Circuit Courts of Appeals have invalidated school officials' regulatory schemes which sought to forbid or severely curtail high

school students' publishing efforts. In each of these seven cases, *Eisner v. Stamford Board of Education*[13], *Quarterman v. Byrd*[14], *Fujishima v. Board of Education*[15], *Shanley v. Northeast Independent School District*[16], *Baughman v. Freienmuth*[17], *Sullivan V. Houston Independent School District*[18], *Jacobs v. Indianapolis Board of School Commissioners*[19], and *Nitzberg v. Parks*[20], federal appellate courts only one level below the U. S. Supreme Court upheld students' rights to publish and distribute literature.

A common theme runs through these seven cases: school officials had improperly attempted to suppress student free expression, and aggrieved students won relief in the courts.

Even in *Eisner*, the most cautious of these seven decisions, the court held that there can be no prior censorship of student-produced literature unless there are carefully drawn procedural safeguards. In this least student-freedom oriented decision, the court said procedures for censorship must include: short time limits for review of student works; a requirement for showing a reasonable basis to curtail student rights, if there is any curtailment; and clear provisions for students to follow in securing any required administrative review. In *Eisner* the court did not require school officials to justify each each of censorship by seeking judicial sanctification of the decision, but it did place the burden of proof on the censor and not the student if the student should challenge the censorship decision in court.[21]

Significantly, the court in *Eisner* agreed that the censorship must be justified by a showing that the expression in question would cause a material or substantial disruption of school routine. A mere showing that student expression is unfriendly toward the school administration or in bad taste will not justify censorship.

Nevertheless, the *Eisner* decision has since been criticized as too restrictive of student freedoms, both in a law review[22] and in *Fujishima*, a later decision of another circuit court.[23] Both of these authorities concluded that *no prior restraint* of student expression is constitutionally permissible under circumstances where a government would not be permitted to exercise prior censorship over a professional publisher. As already noted, under *Near v. Minnesota* and the cases that followed this 1931 precedent, such prior censorship is permitted only when the government has successfully overcome "a heavy presumption against its constitutional validity."[24]

Regardless of whether a court were to follow the *Eisner* line of cases or the thinking exemplified by *Fujishima*, the student-press censor will find his position a difficult one to defend. There appears to be no reported case in which a school district successfully justified any scheme of prior censorship as constitutionally sound. Some courts have talked of the hypothetical possibility that a valid school censorship plan might be developed, but no court has found a plan it could uphold.

However, one may argue that these cases involved unofficial or "underground" publishing efforts and would not apply to official school newspapers.

That argument received a thorough rebuttal in the works of Fager[25] and Trager,[26] both of which were presented at previous conferences of the Association for Education in Journalism. Suffice it to say here that a school administration need not set up an official student newspaper as a forum for

student expression, but once it does it can no more control the content therein than a city may control the content of speeches at an open forum "soap box" in a public park.[27] A very recent federal district court decision in Virginia, *Boyd v. Fairfax County Board of Education*,[28] is one of many instances in which censorship of an official student newspaper has been invalidated on the "forum theory."

As Trager[29] suggested, a student editor may have broader latitude than a commercial editor who works for a private publisher, inasmuch as the latter takes orders from his boss. But the school official who attempts to analogize his status to that of a private publisher giving orders to employees is apt to find that his actions constitute "state action," and that he cannot ignore the First Amendment as a private publisher may in dealing with the hired help.

Unfortunately, most of the precedents supporting this conclusion at the high school level are federal *district court* cases, and thus are less persuasive than rulings of the circuit courts or the Supreme Court. But on the other hand, there is almost no case-law to support the position that the school official's relationship to a student editor *may be* analogized to the private publisher-employee relationship. To argue that the school district or a school principal is the "publisher" of a student newspaper is tempting to school officials and others wishing to deny students the right to an independent editorial voice, but the courts have not interpreted the First and Fourteenth Amendments in that fashion.

Two other issues are often raised when one argues for the freedom of the student press: the possibility of libel and obscenity, and the rights of students attending private schools.

The questions of libel and obscenity will be discussed in connection with the review of California statutory guarantees of free expression for students. The private-school issue will be dismissed here with the observation that all constitutional arguments for student freedom of expression are based on the "state action" theory as applied in the Fourteenth Amendment. It *is* possible for a private school's administrators to become imbued with "state action," should they become excessively entangled in government funding or control. In private college student rights cases, the courts have divided sharply, finding that some institutions fall within the definition of "state action" and thus must obey the federal constitution's free-expression mandates while others do not.[30]

CALIFORNIA'S FREE-EXPRESSION STATUTE

While civil libertarians have been applauding the line of federal court decisions protecting the constitutional rights of student journalists, the majority of America's student writers and editors have continued to face the same constraints as they did under the "in loco parentis" doctrine.

Why? Because judicial precedents are great for lawyers, but the typical school official, untrained as he is in the law, sees little relationship between these seemingly esoteric and theoretical arguments and the conduct that is required of him as a public official.

It is axiomatic that the redress of wrongs in the courts is available only to those with the means and motivation to challenge an unlawful regulation. In the practical world of student journalists, faculty advisors, and administrative authorities who seemingly hold vast powers in comparison to the student or teacher, a constitutional challenge in court is indeed rare.

However, the school administrator by his nature is a person who makes and knows he must obey rules and regulations. Whereas the significance of a decision of the Fourth Circuit Court of Appeals may elude him, his duty to obey his own district's regulations – and particularly state laws – probably will not.

It is primarily in view of this fact that this paper was prepared. Its main purpose is to report California's unique experiment with statutory guarantees of freedom of expression for students, an experiment apparently not duplicated elsewhere and little noticed even in California.

Shortly after the Supreme Court's *Tinker* decision, a three-judge federal district court in San Francisco handed down *Rowe v. Campbell*[31], an unreported decision (i.e., one that can only be obtained by writing to the clerk of the court and requesting it by number – no. 51060 in this case). Relying on the constitutional considerations in *Tinker*, the three judges in *Rowe* invalidated two sections of the California Education Code which had banned "partisan" and "propaganda" publications from school campuses. The court found these laws to be unconstitutionally overbroad and vague, and invited the school district involved to rewrite its literature-distribution regulations in a manner that would conform to the Constitution.

The district promptly drafted new regulations which proposed extensive prior restraints on students who sought to distribute literature, and the court again responded by overruling them on constitutional grounds. "It may well be that no system of prior restraint in the area of student publications can be devised which imposes a restraint sufficiently short-lived and procedurally protected to be constitutional," the three judges said in their second *Rowe* opinion. The court went on to suggest that perhaps a prohibition on certain *categories* of material (e.g., obscenity), with school officials empowered to seek a court order forbidding distribution of literature falling into these categories, might meet constitutional requirements.

In 1971, the California State Legislature responded to this decision by enacting its own set of statutory guarantees of free expression on school and college campuses. Appendix I presents the text of Education Code section 10611 (now renumbered as section 48916), which set forth the free expression guarantees for students below college level. A separate but very similar law, Education Code section 25425.5 (now numbered 76120) protects the rights of community college students. Under California's constitution, the legislature has no authority to enact rules governing the University of California, whose Board of Regents is autonomous in such matters. The legislature apparently felt such a law was not needed for California's 19 state college and university campuses, which *are* within the legislature's purview, because no state college version of section 10611 was enacted. Nevertheless, Education Code sections 10611 and 25425.5 represented a great victory for those who believe in free expression for students. In a sweeping fashion, they authorized open distribution of literature, use of bulletin boards, the wearing of buttons and badges, and the like, with restrictions only on material that is obscene, libelous or slanderous "according to current legal standards."

However, these laws quickly becam controversial for what they omitted more than for what they included. Notably, they made no specific reference to official student newspapers produced in journalism classes.

A 1974 legal opinion by the California Legislature Counsel, lawyer to the state legislature, concluded that official student newspapers are protected by the constitution and Education Code section 10611 (now 48916). Said Robert Gronke, deputy legislative counsel, in his opinion dated March 20, 1974:

> "While the governing board of a school district is given certain broad powers to control the editorial and advertising content of a high school newspaper published as part of a course of study in journalism, . . . it is our opinion that material cannot be excluded from such publications unless it is obscene or libelous or would substantially disrupt or materially interfere with school activities."

The legislative counsel's opinion added:

> " . . . when a school district acts as the publisher of a high school newspaper, its power to control the content of such a publication is necessarily more limited than would be the case if a private publisher was involved. Once the school district establishes a student activity which involves elements of free expression, any control or censorship which exists must be consistent with First Amendment constitutional guarantees."

Although comforting to those who favor a free student press, that opinion had little impact on school officials in California. For instance, when confronted with this ruling, the Los Angeles Unified School District simply produced its own attorneys, who said they disagreed with the state Legislative Counsel. Short of a court test in an appropriate case, little can be done when a school district takes this sort of attitude.

As recently as early 1975, in fact, the Los Angeles school system still had a district-wide policy in its course of study for advanced journalism classes which stated, "The principle of freedom of the press does not apply to school newspapers."

Obviously, what was needed if the student press was to be free of administrative censorship in California, was: 1) a wholesale rewriting of board policies such as those in Los Angeles[32]; 2) court challenges to rules such as these in appropriate test cases; and 3) a revision of section 48916 to specifically include official student newspapers within its provisions, since school officials usually understand statutory laws better than legal opinions or court decisions.

In the years since the Los Angeles Unified School Board chose to ignore the Legislative Counsel's opinion, there has been movement in California in all three of these areas.

THE LOS ANGELES GUIDELINES

While journalism teachers in other areas watched with some admiration, the Los Angeles Journalism Teachers Association (LAJTA) organized and began lobbying for changes in district policies on press censorship. The primary goal was to reduce the authority of the school principal to arbitrarily censor student newspapers.

Although what ensued is an interesting story of internal political maneuvering and a worthwhile study of First-Amendment paranoia at the local level, a full presentation of the details of the Los Angeles board policy struggle is beyond the scope of this paper. Here follows a brief summary of what happened.

In 1975, the Los Angeles school board refused, by a 5–2 vote, to approve guidelines allowing the student press to function free of censorship by school principals. Instead, the board affirmed the rule set forth in Appendix II, granting the school principals broad powers to control student newspapers.

However, the 1976 school board elections produced a new and more liberal majority on the school board, leading LAJTA members to believe they might win some change in the city's restrictive guidelines for control of the student press. The journalism teachers' group secured support from a variety of professional journalistic groups, including the Los Angeles professional chapter of Sigma Delta Chi, the Society of Professional Journalists, and several prominent local television news personalities.

At one meeting, the journalism teachers paraded several of their celebrity backers before the school board to support a more liberal set of student press guidelines. Alarmed, the Los Angeles district's school principals' association organized and endeavored to provoke parent-group and student government opposition to the proposed new guidelines. The board began to receive letters opposing student press freedom from concerned parents.

The journalism teachers' group arranged meetings with representatives of the Los Angeles city student government leaders and school advisory groups, seeking to neutralize the opposition. After a series of compromises in which prohibitions on profanity and endorsing candidates for office were added to the proposed guidelines, the opposition appeared to dissipate.

While these kinds of compromises must be viewed with considerable alarm from a constitutional standpoint, the journalism teachers felt the resulting document was the best that could be won in the political process.

They took the compromise version of their student press guidelines before the Los Angeles school board on January 20, 1977, and won board approval by a 6–1 vote. The guidelines thus approved appear as Appendix III. They replace the old more restrictive version of Board Policy No. 1275 that appears in Appendix II.

As approved, the "liberal" guidelines still permit the principal to review copy prior to publication and allow prior censorship of student publications for libel, slander, obscenity and material which would cause substantial disruptions of school activities – as permitted in Education Code section 48916.

However, as will be explained shortly, a recent California Supreme Court decision forbids any prior censorship even for these reasons. Even more alarming from a constitutional viewpoint, the "liberal" guidelines also allow censorship for a variety of other kinds of material – material that has repeatedly been found to be protected by the First Amendment in the court decisions previously cited.

Nevertheless, the Los Angeles journalism teachers' group regards these guidelines as a major victory over the kind of student press censorship that occurred under the old rules. More will be said of the constitutional issues shortly.

CALIFORNIA'S BRIGHT DECISION

While the Los Angeles school board, school principals, and the journalism teachers' group were wrestling with school press guidelines that went far beyond the authority of Education Code section 48916, the California courts were reviewing the code section itself.

Susannah Bright, a sophomore at University High School in Los Angeles in 1974, was writing articles for an unofficial student newspaper named "The Red Tide." As required by Los Angeles' rules on literature distribution (see Appendix IV for appropriate excerpts), she submitted her newspaper to the administration at University High for prior review before distribution.

One article alleged that the principal of another school had told a lie in explaining how that school's dress code was adopted.

The University High administration conferred with the principal mentioned in the article and determined that he admitted making the statements attributed to him in "The Red Tide," but denied they were "lies."

After consulting with attorneys for the school district and the county of Los Angeles, the University High administration censored "The Red Tide," denying Ms. Bright the right to distribute it on campus.

Ms. Bright sued the school district under Education Code section 48916, contending the prior censorship was unlawful.

In December, 1976, the California Supreme Court handed down its decision in *Bright v. Los Angeles Unified School District*[33]. Speaking for a unanimous Supreme Court, Justice Sullivan ruled

that section 10611 (now 48916) did NOT authorize any form of prior censorship of student expression.

The court pointed out that school officials retained the authority to punish a student who distributes material violating 48916's prohibitions on obscenity, libel, slander, and material that would substantially disrupt school activities. Moreover, the court said, school officials could halt distribution of improper material after it had begun. Said the court:

> "We hold that the regulations of defendant Los Angeles Unified School District here under review . . . insofar as they purport to authorize prior censorship of the contents of student publications, are invalid. We emphasize, however, that our holding does not leave school authorities without adequate sanctions, since of course they retain their power to discipline students who attempt to distribute prohibited material." (18 Cal 3d at 462)

Elsewhere in its *Bright* opinion, the California Supreme Court invalidated a Los Angeles city regulation which forbad the *sale* of student publications.

> "We therefore hold that section 10611 (48916) does not authorize school districts to ban the sale of printed materials by students which are otherwise entitled to be distributed and that the regulations of defendant school district to that extent are invalid as violative of statutory authority." (18 Cal 3d at 464).

However, *Bright* should not be viewed as an absolute victory for student press freedom in California for two reasons. First, the court did not lay down an outright prohibition on prior censorship. The court said:

> " . . . we hold that section 10611 (48916) does not authorize school districts to establish systems of prior restraint in respect to the distribution of the prohibited categories of expression delineated in the statute. We do not say that the Legislature could not constitutionally establish such a system in the public school environment. We say only that it has not done so." (18 Cal 3d at 462)

Moreover, the *Bright* decision involved an unofficial student newspaper, not a school-funded campus paper. While the language in *Bright* does not restrict its holding to underground papers, school officials could continue to deny its applicability to official papers until another court ruling instructs them otherwise! In this regard, it is particularly noteworthy that it was less than a month after the *Bright* decision prohibited prior restraints under section 48916 that the Los Angeles school board adopted the school press guidelines in Appendix III. As already pointed out, these guidelines contain extensive provisions for prior censorship under a wide range of circumstances.

However, the Supreme Court in *Bright* devoted considerable attention to the *Baughman v. Freienmuth*[34] precedent. The *Bright* court pointed out that *Baughman* was an especially

appropriate authority because it dealt with regulations requiring that a newspaper be submitted for prior approval, with school authorities allowed to censor it for libel and obscenity.

Concluding its examination of the *Baughman* precedent, the California Supreme Court quoted this passage from *Baughman*:

> "(T)he use of terms of art such as 'libelous' and 'obscene' are not sufficiently precise and understandable by high school students and administrators untutored in the law to be acceptable criteria (in the context of prior restraint) . . . Thus, while school authorities may ban obscenity and unprivileged libelous material there is an intolerable danger, in the context of prior restraint, that under the guise of such vague labels they may unconstitutionally choke off criticism, either of themselves, or of school policies, which they may find disrespectful, tasteless, or offensive." (478 F2d at 1350–51)

This language from *Baughman*, cited approvingly by the California Supreme Court in *Bright*, would seem to bring the entire regulatory scheme of Education Code section 48916 into question. Clearly, 48916 purports to authorize persons untrained in the law (such as school principals) to make decisions about such complex legal issues as libel and obscenity. Continuing the passage cited above, the *Baughman* opinion says:

> "Indeed such terms (as obscenity and libel) are troublesome to lawyers and judges. None other than a justice of the (U. S.) Supreme Court has confessed that obscenity 'may be indefinable.' *Jacobellis v. Ohio*, 378 U. S. 184, 197; 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring). 'Libelous' is another legal term of art which is quite difficult to apply to a given set of words. Moreover, that words *are* libelous is not the end of the inquiry: libel is often privileged. *New York Times v. Sullivan*, 376 U. S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)."

Because of these problems, the federal appellate court in *Baughman* invalidated a set of guidelines similar in effect to California Education Code 48916. It was, in fact, a set of guidelines less restrictive of student freedom than the Los Angeles school board's new "liberal" policy. An excerpt of the guidelines ruled unconstitutional in *Baughman* are included as Appendix V, so they may be compared with those adopted by the Los Angeles school board and those set forth in California Education Code section 48916.

In view of this fact – and in view of the unanimity of federal courts all over America in responding similarly to issues of student press freedom – it would seem very likely that, in an appropriate test case, the new "liberal" Los Angeles guidelines would be ruled unconstitutional.

Given an instance in which a school newspaper writer wished to criticize his teachers or administration in strident terms, and where the student was censored either under the authority of section 48916 or the Los Angeles guidelines, it seems unlikely that the California law or Los

Given an instance in which a school newspaper writer wished to criticize his teachers or administration in strident terms, and where the student was censored either under the authority of section 48916 or the Los Angeles guidelines, it seems unlikely that the California law or Los Angeles school board policy would prevail over the *Bright* precedent and the entire line of supporting federal decisions.

A particularly troublesome issue in such a situation might well be an allegation of "obscenity" as a basis for student press censorship. While the U. S. Supreme Court has repeatedly ruled true obscenity outside the protection of the first amendment (see, for instance, *Miller v. California*[35]), the Supreme Court has also repeatedly emphasized that the mere use of vulgar or tasteless language in a non-prurient context does *not* constitute obscenity.

For instance, in *Cohen v. California*[36], the U. S. Supreme Court ruled that the use of our language's most popular four-letter sexual expletive in the context of criticizing a person or an institution is NOT obscene. Likewise, in *Papish v. University of Missouri Curators*[37], the Supreme Court found that the popular 12-letter reference to an unhealthy relationship with one's mother is NOT obscene when used in a similar non-prurient context.

However, it seems certain that virtually all school principals (and most journalism teachers) would regard these words as "obscene" if used by a high school student in copy for publication. If a student were subjected to prior censorship or punishment for the use of such language under section 48916 or a policy like the one in Los Angeles, there would be a clear constitutional rights violation – and any policy or law broad and vague enough to permit such misinterpretations is arguably void for vagueness or overbreadth.

AMENDING THE CALIFORNIA STATUTE

Within a month of the *Bright* decision's ban on prior restraint of student expression under section 48916 of the California Education Code, State Senator Ralph Dills introduced legislation that would restore legislative authority for prior restraint. He did so on behalf of both northern and southern California groups of journalism teachers. The proposed amendment to section 48916, embodied in Senate Bill 357, appears in Appendix VI.

The amended law seems attractive because it would give journalism teachers something they have been seeking for several years in California: a specific provision including official student newspapers within the safeguards of section 48916. The teachers' groups feel that the provision for prior restraint in cases of libel, slander, obscenity, and material threatening a substantial disruption of school activities is a small price to pay for the specific language including their students' products within the law.

In fact, some journalism teachers feel that prior restraints are essential in that a school administration faced with the prospect of a truly "free" student newspaper would simply

discontinue journalism instruction and abolish the student publications program altogether.

Be that as it may, an analysis of the proposed amendments to section 48916 would seem to reveal a serious constitutional infirmity. The amended code section would specifically authorize prior restraints on student expression with broad and vague language setting forth categories of forbidden expression. As already pointed out, that is precisely the sort of prior censorship scheme invalidated in *Baughman v. Freienmuth.*[38] Inevitably, the amended section 48916 would encourage school officials to stifle expression falling far short of the current legal definitions of unprivileged libel or obscenity.

Perhaps an even greater danger in a law that allows prior censorship of the student press for things like "libel" is the *in terrorem* effect it would have in compelling a student to defend his "libelous" statement before the very official allegedly "libelled!" That requiring a 16-year-old student to justify his criticism of his school principal in an audience with that authority figure would have a chilling effect on freedom of expression is self-evident.

Another shortcoming of SB357, of course, is that it would amend only section 48916 – the public school free expression law – without affecting Education Code section 76120, the equivalent community college law. If passed, SB357 would afford high school (and technically even elementary school and junior high publications) a legal status that community college publications lack!

The 1977 legislature's SB357 is by no means the first attempt to amend section 48916 to authorize prior restraint of student expression coupled with a provision to include official student newspapers within the law's specific coverage.

In 1974, Assembly Bill 207 included substantially the same provisions, as did Senate Bill 2120 in 1976.

AB207 passed the California Assembly and was sent to the Senate on May 12, 1975. It received a "do pass" recommendation from the Senate Education Committee, but was defeated 20–11 on the Senate floor August 14, 1975. After a motion to reconsider, it was amended in minor ways and brought to another Senate vote on August 11, 1976, failing 21–17.

In each instance, AB207 stirred opposition from both liberals (who regarded the prior censorship provisions as unconstitutional and unconscionable) and from conservatives (who predicted profanity-filled student newspapers should the measure pass).

The new bill introduced in 1976, SB2120, got only as far as the Senate floor, where it failed on a 17–17 tie vote.

At this writing, the 1977 bill is scheduled for Senate floor consideration. Its backers feel certain they can muster sufficient votes to get it through the Senate and into the more friendly environment of the Assembly this year.

California Governor Edmund G. Brown has not yet indicated his willingness or unwillingness to sign the bill into law. An even larger question, of course, is whether the constitutional problems inherent in SB357 will lead inevitably to an adverse court decision should it pass and be signed into law. Hopefully, a court following the *Bright* precedent would invalidate the provisions for prior restraint without upsetting the law's provisions to include official student newspapers within its scope.

CONCLUDING OBSERVATIONS

Early in this paper, we noted that student publications already enjoy strong constitutional protection under the landmark *Tinker v. Community School District* decision of the U. S. Supreme Court. For the censored student editor with the means and motivation to assert his constitutional rights in federal court, the prospect of success remains quite high.

However, school officials continue to ignore the constitutional precedents and student editors continue to face a variety of kinds of suppression, the First and Fourteenth Amendments notwithstanding.

California has traveled an unusual road in response to these constitutional principles, but with few encouraging results for the practical world of student journalists. At this writing, California does indeed have a strong state law protecting student expression, a law made even stronger by the anti-prior-censorship provisions of the California Supreme Court's *Bright* decision. But even in the face of a Legislative Counsel's opinion to the contrary, school officials continue to ignore the law's provisions, adopting restrictive policies for student newspapers that flaunt their defiance of the First Amendment and the law.

Moreover, the California student-expression law appears destined for amendments that would reimpose a constitutionally suspect system of prior restraints in return for a specific provision including official student newspapers within the law's scope.

One can only conclude that freedom of the student press is little safer in the halls of a legislature than it is in a school district boardroom. Perhaps the best safeguard of press freedom continues to be found in the courts, even though faraway judicial precedents carry little weight with censorship-prone school principals. Fortunately, precedents carry great weight in court, on those rare occasions when a censored student editor hauls his principal into one!

APPENDIX I – CALIFORNIA EDUCATION CODE SECTION 10611 (now 48916)

Section 10611. [Students' right to exercise free expression; Regulations]

Students of the public schools have the right to exercise free expression including, but not limited to, the use of bulletin board, the distribution of printed materials or petitions, and the wearing of buttons, badges, and other insignia, except that expression which is obscene, libelous, or slanderous according to current legal standards, or which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school, shall be prohibited.

Each governing board of a school district and each county superintendent of schools shall adopt rules and regulations relating to the exercise of free expression by students upon the premises of each school within their respective jurisdictions, which shall include reasonable provisions for the time, place, and manner of conducting such activities.

Added by Stats 1971 Ch 947 Section 3.

APPENDIX II – Los Angeles School Board Policy 1275, 1974 Version

Los Angeles City Schools

BOARD RULE 1275*

A school newspaper is primarily designed to serve as a vehicle for instruction and is, in addition, intended as a means of communication. Therefore, it is operated, substantially financed, and controlled by the School District. The ultimate decision regarding the material to be included in such a newspaper must, therefore, be left to the judgment of the school principal.

A school newspaper can best function when a full opportunity is provided for students to inquire, question, and exchange ideas. Articles should reflect all areas of student interest, including topics about which there may be dissent and controversy. IT IS THE INTENT OF THE BOARD THAT STUDENTS BE PROVIDED WITH AVENUES FOR THE RESEARCH OF IDEAS AND CAUSES OF INTEREST TO THEM AND SHOULD BE ALLOWED TO EXPRESS THEIR OPINIONS. Controversial subjects should be presented in depth with a variety of viewpoints published simultaneously.

In the event of disagreement with the principal over a news article or editorial, the student editor and the journalism teacher may appeal the decision of the principal to the area superintendent.

*adopted April 22, 1974
Capitalization in paragraph 2 added by typist.

APPENDIX III – Los Angeles School Board Policy No. 1275, 1977 Version

GUIDELINES FOR OFFICIAL STUDENT NEWSPAPERS (Adopted 1/20/77 as Board Rule 1275)

INTRODUCTION: A school newspaper is designed to serve as a vehicle for instruction and is, in addition, a means of communication. It is operated, substantially financed, and controlled by the Student Body and the school district. A school newspaper can best function when a full opportunity is provided for students to inquire, question, and exchange ideas. Articles should reflect all areas of student interest, including topics about which there may be dissent and controversy. It is the intent of the Board that students be provided with avenues for the research of ideas and causes of interest to them and should be allowed to express their opinions. Controversial subjects should be presented in depth with a variety of viewpoints published.

PURPOSES OF OFFICIAL STUDENT NEWSPAPERS: (1) To exist as an instructional device for the teaching of writing and other journalistic skills; (2) To provide a forum for opinions of students, school staff, and members of the community; (3) To serve the entire school by reporting school activities.

RIGHTS OF STUDENT JOURNALISTS: (1) To print factual articles dealing with topics of interest to the student writers; (2) To print, on the editorial page, opinions on any topic, whether school related or not, which they feel is of interest to themselves or to the readers.

RESPONSIBILITIES OF STUDENT JOURNALISTS: (1) To submit copy that conforms to good journalistic writing style; (2) To re-write stories, as required by the journalism advisor, to improve journalistic structure, sentence structure, grammar, spelling and punctuation; (3) To check facts and verify quotes; (4) In the case of editorials on controversial issues, to provide space for rebuttals, in the same issue if possible, but otherwise no later than the following issue; (5) Subject to the specific limitations in these Guidelines, student editors are responsible for determining the contents of their official student newspapers.

MATERIAL NOT PERMITTED IN SCHOOL NEWSPAPERS: (1) Material which is libelous or which violates the right of privacy; (2) Material which is obscene, according to current standards of the community; (3) Profanity, hereby defined as that language which would not be used in the L. A. Times or the L. A. Herald-Examiner; (4) Material which advocates the breaking of any law; (5) Material which criticizes or demeans any race, religion, sex or ethnic group; (6) Ads for cigarettes, liquor, or any other product not permitted to teenagers; (7) Any material, the publication of which would cause substantial disruption of the school. Substantial disruption is hereby defined as the threat of physical violence in the school or nearby community and/or the disruption of the school's educational program; (8) Endorsements of political candidates or ballot measures, whether such endorsements are made by editorial, article, letter, photograph or cartoon. The newspaper may, however, publish "fact sheet" types of articles on candidates and ballot measures provided such articles do not endorse any person or position, and provided equal space is provided for all candidates for a particular office and for both sides of a ballot measure.

DETERMINATION OF APPROPRIATENESS: (1) The newspaper advisor shall have the primary responsibility of reviewing each article, prior to its publication, to determine if it satisfies all the conditions of these Guidelines; (2) The school principal or his designated representative other than the newspaper advisor may also review copy prior to its publication, if he so requests; however, such copy must be returned to the student editors within 24 hours after it is submitted for review; (3) No copy may be censored except for reasons specifically listed in these Guidelines; (4) Nothing in these Guidelines is intended to allow censoring of any article merely because it is controversial or because it criticizes a particular school, a school procedure, or the school system itself.

RESOLUTION OF DIFFERENCES: (1) In the event of disagreement as to whether an article shall be printed, each school shall have a Publications Board, which shall meet within 24 hours to submit its opinion; (2) The Publications Board shall consist of the principal or his designated representative; the journalism advisor; the editor-in-chief; a representative from student government, from the PTA/PTSA and from the Advisory Council; and other members as mutually agreed upon; (3) If the Publications Board cannot solve the dispute, then an appeal may be made to the Area Superintendent, who may seek advice from the Board's legal staff in making his decision; (4) Further appeal may be made in accordance with Secondary School Curriculum Guide for Instruction, pages 35–38, titled *Controversial Material*.

APPENDIX IV – Los Angeles School Board Policy 1276 (excerpt)

Los Angeles School Board Administrative Regulation 1276–1.

"The procedures to be followed in the implementation of guidelines relating to student expression on campus are as follows:

"a. Circulation of Petitions, Circulars, Newspapers, and Other Printed Matter. Students should be allowed to distribute petitions, circulars, leaflets, newspapers, and other printed matter subject to the following limitations:

" . . . . . .

"d. Prohibited Material.
"1. Material which is obscene to minors according to current legal definitions.
"2. Material which is libelous according to current legal definitions.
"3. Material which incites students so as to create a clear and present danger of the imminent commission of unlawful acts or of the substantial disruption of the orderly operation of the school.

"4. Material which expreses or advocates racial, ethnic, or religious prejudice so as to create a clear and present danger of imminent commission of unlawful acts or of the substantial disruption of the orderly operation of the school.

"5. Material which is distributed in violation of the time, place, and manner requirements.

"e. Disciplinary Action.
"Any student who wilfully and knowingly:
"1. distributes any petitions, circulars, newspapers, and other printed matter;
"2. wears any buttons, badges, or other insignia;
"3. posts on a bulletin board any item in violation of the aforementioned prohibitions should be suspended, expelled or otherwise penalized depending on the severity of the violation, and in accordance with established disciplinary procedures."

APPENDIX V – Montgomery County, Maryland, School Board Regulations on Literature Distribution (excerpt), Invalidated by Federal Appellate Court

Under the following procedures, student publications produced without school sponsorship may be distributed in schools:

. . . . . .

4) A copy must be given to the principal for his review. (He may require that the copy be given him up to three school days prior to its general distribution.) If, in the opinion of the principal, the publication contains libelous or obscene language, advocates illegal actions, or is grossly insulting to any group or individual, the principal shall notify the sponsors of the publication that its distribution must stop forthwith or may not be initiated, and state his reasons therefor. The principal may wish to establish a publications review board composed of staff, students, and parents to advise him in such matters.

Students may distribute or display on designated bulletin boards materials from sources outside the school subject to the same procedures that govern student publications . . .

APPENDIX VI – SB 357, as introduced in the 1977 California State Senate

An act to amend Section 48916 of the Education Code, relating to pupils.

LEGISLATIVE COUNSEL'S DIGEST

SB 357, as introduced, Dills. Schools: pupils: student newspapers.

The law currently specifies that public school pupils have the right to exercise free expression, including the right to use bulletin boards, to distribute printed materials, and to wear buttons, badges, and other insignias. This right is limited to expression which is not obscene, libelous, or slanderous and which does not create a clear and present danger of various unlawful acts. The right is subject to reasonable regulation by the school district governing board.

This bill would include the right to exercise freedom of speech and of the press, and specifically the right of expression in official school publications among the rights currently guaranteed and would provide in addition that the right to such expression in such publications or other means of expression would be guaranteed whether or not they are supported financially by the school or by use of school facilities.

Existing law requires the adopting of rules and regulations relating to the exercise of free expression by the governing board of a school district and county superintendent of schools.

This bill, instead, would require that each governing board and county board of education adopt rules and regulations in the form of a written publications code.

This bill would specify the responsibility of student editors and journalism advisers, and would define "official school publications."

This bill would also specifically prohibit the prior restraint of material for official school publications except insofar as it violates this bill. The bill would specify that school authorities have the burden of showing justification without undue delay prior to any limitations of student expression.

This bill would specify that it does not make an appropriation or create an obligation to reimburse local agencies pursuant to Section 2231 of the Revenue and Taxation Code since the costs mandated by this bill are minor in nature.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 48916 of the Education Code is amended to read:

48916. Students of the public schools *shall* have the right to exercise ~~free expression~~ *freedom of speech and of the press* including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, ~~and~~ the wearing of buttons, badges, and other insignia, *and the right of expression in official publications, whether or not such publications or other means of expression are supported financially by the school or by use of school facilities*, except that expression *shall be prohibited* which is obscene, libelous, or ~~slanderous~~ *slanderous*. ~~according to current legal standards~~, or *Also prohibited shall be material* which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the ~~school, shall be prohibited.~~ *school*.

Each governing board of a school district and each county ~~superintendent of schools~~ *board of education* shall adopt rules and regulations ~~relating to the exercise of free expression by students upon the premises of each school within their respective jurisdictions.~~ *in the form of a written publications code* which shall include reasonable provisions for the time, place, and manner of conducting such ~~activities~~. *activites within its respective jurisdiction.*

Student editors of official school publications shall be fully responsible for assigning and editing the news, editorial, and feature content of their publications subject to the limitations of this section. However, it shall be the responsibility of a journalism adviser or advisers of student publications within each school to supervise the production of the student staff.

There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to any limitation of student expression under this section.

"Official school publications" shall refer to material produced by students in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee.

SEC. 2. Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section nor shall there be any appropriation made by this act because the duties, obligations or responsibilities imposed on local government by this act are minor in nature and will not place any financial burden on local government.

REFERENCES

[1]Tinker v. Des Moines Community School District, 393 U. S. 503 (1968).

[2]Fager, Christopher B., *Ownership and Control of the Student Press: A First Amendment Analysis* (Washington, D. C.: The Student Press Law Center, Rm. 112, 1750 Pennsylvania Avenue, N. W. (1976).

[3]Letwin, Leon, *Regulation of Underground Newspapers on Public School Campuses in California* (1974–75), 22 UCLA Law Review 141.

[4]Trager, Robert E., *Prior Restraint in High School: Does It Violate Students' First Amendment Rights?* (A paper presented to the Secondary School Division, Association for Education in Journalism, 1974)

[5]For a full discussion of this argument, see Trager, *The College President is not Eugene C. Pulliam: Student Publications in a New Light* (A paper presented to the Law Division, Association for Education in Journalism, 1974)

[6]Near v. Minnesota, 283 U. S. 697 (1931).

[7]New York Times v. U. S., 403 U. S. 713 (1971).

[8]Rowe v. Campbell Union School District, No. 51060 (N.D. Cal. 1970).

[9]Bright v. Los Angeles Unified School District, 18 Cal3d 450 (1976).

[10]Rowe, supra.

[11]Tinker, supra.

[12]Literally, "in the place of the parent." A philosophy justifying an arbitrary denial that students have any rights as independent persons.

[13]Eisner v. Stamford Board of Education, 440 F2d 803 (2nd cir. 1971)

[14]Quarterman v. Byrd, 453 F2d 54 (4th cir. 1971)

[15]Fujishima v. Board of Education, 460 F2d 1355 (7th cir. 1972)

[16]Shanley v. Northeast Independent School District, 462 F2d 960 (5th cir. 1972)

[17]Baughman v. Freienmuth, 478 F2d 1345 (4th cir. 1973)

[18]Sullivan v. Houston Independent School District, 475 F2d 1071 (5th cir. 1973)

[19]Jacobs v. Indianapolis Board of School Commissioners, 490 F2d 601 (7th cir. 1973)

[20]Nitzberg v. Parks, 525 F2d 378 (4th cir. 1975)

[21]In so ruling the *Eisner* decision declined to follow the example of the U. S. Supreme Court in *Freedman v. Maryland*, 380 U. S. 51 (1965), where movie censors were required to secure judicial approval of each act of censorship. Instead, the *Eisner* court held that student expression warrants less protection than does expression in the form of a commercial motion picture.

[22]Note, *Prior Restraints in Public High Schools*, 82 Yale Law Journal 1325 (1973)

[23]Fujishima, supra.

[24]Quoted from Bantam Books, Inc. v. Sullivan, 372 U. S. at 70.

[25]Fager, *Ownership and Control of the Student Press*, supra.

[26]Trager, *The College President is not Eugene C. Pulliam*, supra.

[27]For instance, see Dickey v. Alabama, 273 F. Supp. 613, where the court said (on 618): "There was no legal obligation on the school authorities to operate a school newspaper. However, since this state-supported institution did elect to operate (a newspaper) and did authorize Dickey to be one of its editors, they cannot (expel him for what he wrote in the paper)."

[28]*Update, Students Win*, 65–3 Quill 10 (1977)

[29]Trager, *The College President is Not Eugene C. Pulliam*, supra.

[30]For comparison, see Furumoto v. Lyman, 362 F. Supp. 1267 (1973), a federal district court decision that denied "state action" at Stanford University; Isaacs v. Temple of Philadelphia, 385 F. Supp. 473 (1974), a decision finding "state action" at Temple; and Ryan v. Hofstra

University, 324 NYS2d 964 (1971), a New York state court decision finding "state action" at Hofstra.

[31]Rowe v. Campbell, supra.

[32]In Letwin, supra, the author reported a survey of California County Counsels' and District Attorneys' office in which he found that many of the state's boards of education had not obeyed the mandate in Section 48916 to adopt policies on free expression by students, and many of those who did had written rules which the respondent attorneys were anxious to disclaim!

[33]Bright v. Los Angeles Unified School District, supra.

[34]Baughman v. Freienmuth, supra.

[35]Miller v. California, 413 U. S. 15 (1973)

[36]Cohen v. California, 403 U. S. 15 (1971)

[37]Papish v. University of Missouri Curators, 93 S. Ct. 1197 (1973)

[38]Baughman v. Freienmuth, supra.